89-592

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OLA JO GREGORY,

Petitioner

v.

GEORGE WARREN GREGORY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A STATE COURT'S JURISDICTION TO MAKE A CHILD CUSTODY DETERMINATION UNDER THE FEDERAL PARENTAL KIDNAPPING PREVENTION ACT ("PKPA") AND THE STATE UNIFORM CHILD CUSTODY JURISDICTION ACT ("UCCJA") IS PRECLUDED DUE TO ITS FAILURE TO COMPLY WITH THE PROVISIONS OF THE PKPA AND THE UCCJA.

II.

WHETHER THE PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED WHEN (A) SHE WAS NOT SERVED WITH NOTICE OF CHILD CUSTODY MODIFICATION PROCEEDINGS UNDER THE PKPA AND UCCJA; (B) A DEFAULT JUDGMENT WAS RENDERED AGAINST HER MODIFYING CHILD CUSTODY; AND (C) THE TRIAL COURT DID NOT COMPLY WITH THE UCCJA IN ENTERING THE DEFAULT.

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OPINIONS BELOW

The opinion of the Missouri Court of Appeals for the Eastern District (Appendix, *infra*, pp. App. 1-16) is officially reported at 770 S.W.2d 372 (Mo. App. 1989). The decisions of the Missouri Court of Appeals for the Eastern District and the Missouri Supreme Court denying rehearing or transfer are not officially reported. (Appendix, *infra*, App. 16). The decisions of the Missouri trial court are also not officially reported (Appendix, initial child custody order, *infra*, App. 17-20; order denying new trial, *infra*, App. 20-21; order setting modification motion for hearing, *infra*, App. 21; order granting Charles Niedner's withdrawal, *infra*, App. 22; and child custody modification order, *infra*, App. 23-26).

JURISDICTIONAL STATEMENT

The decision of the Missouri Court of Appeals for the Eastern District was entered as a judgment on April 4, 1989. The decision of the Missouri Court of Appeals denying rehearing or transfer was issued on May 2, 1989. The decision of the Missouri Supreme Court denying rehearing or transfer was issued on June 13, 1989. On September 1, 1989, the United States Supreme Court granted an extension of time to file this Petition for Writ of Certiorari for an additional thirty days. Jurisdiction of this Court to review this case is invoked under 28 U.S.C. §1257(a). The appeal seeks direct application of the

Constitution of the United States and interpretation of federal and state uniform laws to this situation.

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Nor shall any state deprive any person of life, liberty, or property, without due process of law . . .
U.S. CONST. amend. XIV, §1.

II. (c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

> (1) such court has jurisdiction under the law of such State . . .

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met . . .

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants . . .
Federal Parental Kidnapping Prevention Act, 28 U.S.C. §1738A (1980).

See Appendix, *infra*, pp. App. 27-34 for Missouri Uniform Child Custody Jurisdiction Act, §§452.455-470 (RSMo 1986) based on *Unif. Child Custody Jurisdiction Act* (U.L.A.) §§5-8 (master ed. 1988).[1]

STATEMENT OF THE CASE

The Petitioner Ola Jo Gregory married the Respondent George Warren Gregory in Hot Springs, Arkansas on June 9, 1973. Subsequent to the marriage, the Gregorys then moved to St. Charles, Missouri where their daughter Cadra was born on April 13, 1984. Ms. Gregory is and always has been her daughter's primary caretaker. She quit her job as a school teacher in order to take care of Cadra on a full-time basis when she was born. The Respondent seldom participated in his daughter's care and upbringing.

On April 9, 1987, Ms. Gregory filed for divorce in St. Charles because of physical and verbal abuse by her husband. Cadra then told her mother that her father was sexually abusing her. Within a few weeks, Ms. Gregory fled with Cadra to her hometown of Hot Springs on August 1, 1987 to live with her mother where they continue to reside. Ms. Gregory kept the Respondent and the court apprised at all times of her and Cadra's

[1]Parallel citations to the Missouri UCCJA and the official uniform law are included for the Court's reference.

whereabouts in Hot Springs. The Respondent never objected to the move or filed contempt charges against Ms. Gregory.

The Gregorys were divorced on November 4, 1987. Judge David A. Dalton refused Ms. Gregory's request to keep custody of Cadra in Arkansas. Instead he found that Cadra be placed in the joint legal custody of both parents, with physical custody awarded to Ms. Gregory and certain rights of visitation awarded to the Respondent. Ms. Gregory filed a motion for new trial which was denied. Judge Dalton ignored the recommendations of child psychologists who verified the trauma experienced by Cadra due to her father's abuse. (Appendix, *infra*, p. App. 34-39). Ms. Gregory timely appealed.

During the pendency of the appeal, the Respondent filed a Motion to Amend Decree ("Motion") on January 20, 1988 asking that he be granted physical custody of Cadra. The Respondent never served Ms. Gregory. Instead he mailed a copy of the Motion to her prior attorney, Charles Niedner. After receiving the Motion, Mr. Niedner had a telephone conversation with Ms. Gregory on January 29, 1988 where they agreed that he withdraw officially as her attorney. (Appendix, *infra*, App. 40) Mr. Niedner filed to withdraw on February 1, 1988 and on February 19, 1988,

the trial court granted his withdrawal. (Appendix, *infra*, App. 41; 22).

A hearing on the Motion was held on February 1, 1988. Ms. Gregory was never served with notice of the hearing or hearing date. No order exists in the record establishing a hearing. Since Mr. Niedner had agreed to withdraw on January 29, 1988, he was barred from taking any further action in the case other than to withdraw. However, contrary to his agreement to withdraw, he appeared at the February 1, 1988 hearing and preserved Ms. Gregory's jurisdictional defenses to the Motion at the hearing. (Appendix, *infra*, App. 41-42).

As a result of the hearing, the court entered an order setting the Motion for an additional hearing some time in the future. Ms. Gregory was never served with the order. A hearing date of March 10, 1988 was set, but no order exists in the record establishing the hearing date. There is no record of her being served with notice of the hearing date as required by Missouri law.

On February 23, 1988, Ann P. Faitz entered her appearance as Ms. Gregory's attorney for the sole purpose of challenging the court's jurisdiction. On that same day, Ms. Gregory filed a Petition for Custody Invoking the Uniform Child Custody Jurisdiction Act ("Petition") in Arkansas where she asked that she be granted primary custody of Cadra and allowed to remain

living in Hot Springs. (Appendix, *infra*, App. 43-52). In the Missouri court, a Response and Amended Response to the Motion were filed on behalf of Ms. Gregory on February 23, 1988 and March 8, respectively. (Appendix, *infra*, App. 52-56). In her response, Ms. Gregory objected to (1) lack of the court's continuing jurisdiction over Cadra; and (2) insufficient and improper service of process of the Motion and subsequent hearings. (Appendix, *infra*, App. 54-57). In her Amended Response, Ms. Gregory raised defenses including (1) lack of the court's jurisdiction over Cadra under the Uniform Child Custody Jurisdiction Act ("UCCJA"); (2) stay of the proceeding pending the outcome of her Petition in Arkansas under the UCCJA; and (3) insufficient and improper service of process of the Motion and subsequent hearings. The Amended Response includes as exhibits copies of her Petition. (Appendix, *infra*, App. 43-52).

On March 10, 1988, during the hearing on the Motion, Judge Dalton acknowledged that responsive pleadings had been filed by Ms. Gregory and took judicial notice of the court file. (Appendix, *infra*, App. 60). Testimony reflects that the court was aware of the pending Arkansas proceeding. (Appendix, *infra*, App. 60-61). Yet the court never invoked jurisdiction under the UCCJA. It did not communicate with the Arkansas court, nor did it stay the proceeding as required under the UCCJA and as requested by Ms. Gregory. Without proof of service of the Motion or hearing dates on Ms.

Gregory, the court found her in default for failure to appear and transferred legal physical custody of Cadra to the Respondent. Ms. Gregory timely appealed the trial court's modification order to the Missouri Court of Appeals pursuant to MO. CONST. art. 5, §3.

The issues on appeal included (1) the court erred in entering a default judgment against Ms. Gregory since it failed to comply with the UCCJA in exercising its jurisdiction to issue such an order; and (2) Ms. Gregory's procedural due process rights were violated due to insufficient and improper service of process upon her of the Motion and notice of hearings. The Missouri court affirmed the modification order. Motions for rehearing or transfer with that court and the Missouri Supreme Court were denied.

Ms. Gregory seeks this Court's redress to (1) uniformly interpret the PKPA and UCCJA and issue a mandate to state courts that they are precluded from assuming jurisdiction in child custody proceedings if they fail to comply with the applicable child custody laws; and (2) protect her guaranteed constitutional procedural due process rights.

ARGUMENT

I.

WHETHER A STATE COURT'S JURISDICTION TO MAKE A CHILD CUSTODY DETERMINATION UNDER THE FEDERAL PARENTAL KIDNAPPING PREVENTION ACT ("PKPA") AND THE STATE UNIFORM CHILD CUSTODY JURISDICTION ACT ("UCCJA") IS PRECLUDED DUE TO ITS FAILURE TO COMPLY WITH THE PROVISIONS OF THE PKPA AND THE UCCJA.

First Ms. Gregory asserts that the Missouri court decided a federal question in a manner which conflicts with the decisions of a majority of other state courts. The Missouri court failed to find that the Missouri trial court was precluded in its assumption of jurisdiction in a child custody proceeding since it did not comply with the provisions of the *Federal Parental Kidnapping Prevention Act*, 28 U.S.C. §1738A (1980) ("PKPA") and the *Uniform Child Custody Jurisdiction Act*, §§452.440-452.550 (RSMo 1986) ("UCCJA"). Secondly, the Missouri court decided an important question of federal law which has not been, but should be, settled by this Court. Specifically, Ms. Gregory is asking for an interpretation of certain provisions of the PKPA and UCCJA to find that a state court is precluded from assuming jurisdiction in a custody proceeding if it fails to stay its own proceeding and communicate with the other state court in which a simultaneous custody proceeding is pending. Without an

interpretation of the PKPA and UCCJA by this Court, this matter will be left to the whims of state courts who will continue to differ in their interpretations of the federal and uniform child custody laws. The recent decision by this Court in *Thompson v. Thompson*, 484 U.S. 174 (1988), provides that the PKPA does not furnish a cause of action in federal court to establish which of two conflicting state custody determinations is valid. This Court found Congress intended the PKPA to only furnish a rule of decision for state courts to follow in that the PKPA does not create a new cause of action. *Thompson* places the burden of determining the proper forum for disputed child custody cases squarely on the shoulders of state courts. It is now more important than ever that state courts uniformly interpret the PKPA and UCCJA. Such interpretation is directly within the purview of this Court to determine for the benefit of all state courts.

The PKPA was adopted by Congress as an addition to the *Full Faith and Credit Statute*, 28 U.S.C. §1738 (1946). Commentaries to the PKPA provide that general purposes of the Act are to promote cooperation and expand the exchange of information and mutual assistance between state courts in child custody proceedings for the best interest of the child in order to avoid jurisdictional conflict with other state courts. 42 U.S.C. §13951(c)(1) and (2). These purposes must be uppermost when construing the PKPA. *Padgett v. Pettis*, 445 So.2d 633 (Fla. App. 1 Dist. 1984); *Wheeler v. District*

Court of Denver, 186 Colo. 218, 526 P.2d 658 (1974). The PKPA expressly incorporates state law in its jurisdictional requirements to allow a state court to make a child custody determination. 28 U.S.C. §1738A(c)(1) and (d).

All fifty states have now adopted the UCCJA which provides the means by which state courts exercise jurisdiction to make child custody determinations. Its purposes are essentially the same as those of the PKPA. *Unif. Child Custody Jurisdiction Act* (U.L.A.) §1 (1988). The provisions of the UCCJA are incorporated into the jurisdictional prerequisites of the PKPA. Thus, in order for a state court to have jurisdiction to make a child custody determination under the PKPA, that state court must have jurisdiction under the UCCJA. 28 U.S.C. §1738A(c)(1). Once a state court has jurisdiction under the PKPA, it can only continue to retain such jurisdiction if it continues to retain it under the UCCJA. 28 U.S.C. §1738A(d). The relationship of the PKPA and UCCJA and their provisions for jurisdiction have been the subject of much litigation, as will be delineated further in this argument. However, they must be read in conjunction. *Garrett v. Garrett*, 292 Ark. 584, 732 S.W.2d 127 (1987).

The UCCJA provides the jurisdictional prerequisites by which a court may make a child custody determination. §452.450 (RSMo 1986); *Unif. Child Custody Jurisdiction Act* (U.L.A.) §6 (1988). When

simultaneous child custody proceedings are occurring in different states, the UCCJA specifically mandates those state courts involved to not exercise jurisdiction and stay any pending proceeding in order to communicate with the other state to determine the more appropriate forum. §452.465(3) (RSMo 1986); *Unif. Child Custody Jurisdiction Act* (U.L.A.) §6 (1988). The Commissioner's Note to Section 6 provides that it seeks to avoid jurisdictional conflict between the states by expecting the courts to actively seek information about the simultaneous custody proceeding pending in the other state. The Note additionally provides that Section 6 must be read in conjunction with Section 7 of the UCCJA, concerning inconvenient forum. *Uniform Child Custody Jurisdiction Act* (U.L.A.) §6, commissioner's note (1988).

Section 7 of the UCCJA allows a court the discretion to decline jurisdiction to make a child custody determination if it finds it is an inconvenient forum. Thus, once a state court is informed that simultaneous child custody proceedings are pending in another state before its own proceeding commences, Section 6 provides that the state court has no discretion, but must stay its own proceeding and actively communicate with the court. After the state court has communicated with the other court, it then has the discretion to either decline or exercise jurisdiction pursuant to the provisions of Section 7. The Commissioner's Note to Section 7 states its purposes are to encourage judicial restraint in exercising jurisdiction and serve as a "second check on

jurisdiction." *Uniform Child Custody Jurisdiction Act*, (U.L.A.) §7, commissioner's note (1988). The purposes of the UCCJA and the Commissioner's Notes clearly establish that compliance with Sections 6 and 7 of the UCCJA are jurisdictional prerequisites to a state court's exercising jurisdiction to make a child custody determination.

Jurisdiction is the power of a court to decide a cause of action. *Klancher v. Andersen*, 113 Colo. 478, 158 P.2d 923 (1945). In order that jurisdiction may be exercised, there must be a case legally before the court, and a hearing, as well as a determination. *Peterson v. Peterson*, 464 A.2d 202 (Me. 1983); *Mattice v. Kingston Trust Co.*, 178 Misc. 256, 33 N.Y.S.2d 799 (1942). Merely filing a petition does not mean a court has assumed jurisdiction under the UCCJA; ordinarily there must be some order of the court indicating it has assumed jurisdiction following the filing of a pleading. *Hobbs v. Hobbs*, 508 So.2d 677 (Miss. 1987). It appears that the provision for the court's assuming jurisdiction as set out in Section 6(c) of the UCCJA has the same meaning as the provision for the court's exercising jurisdiction as set out in Section 6(a) in that the terms are used interchangeably.

A majority of state courts, including Missouri, are in agreement in holding that a court's exercise or assumption of jurisdiction in a child custody case is precluded under Section 6(a) of the UCCJA if, at the

time of filing the petition, "a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with the Act." *Hempe v. Cape*, 702 S.W.2d 152 (Mo. App. 1985); *People ex rel. Stover v. Stover*, 112 App.Div.2d 519, 490 N.Y.S.2d 925 (3d Dept. 1985); *Hepner v. Hepner*, 469 N.E.2d 780 (Ind. App. 3 Dist 1984); *Lopez v. District Court, Fourth Judicial Dist., El Paso County*, 199 Colo. 207, 606 P.2d 853 (1980); *Jennings v. Jennings*, 133 Ill.App.3d 753, 479 N.E.2d 419 (App. 5 Dist. 1985); *Kimmons v. Heldt*, 667 P.2d 1245 (Alaska 1983); *Davis v. Davis*, 53 N.C.App. 531, 281 S.E.2d 411 (1981); *Norsworthy v. Norsworthy*, 289 Ark. 479, 713 S.W.2d 451 (1986); *Wheeler v. Wheeler*, 383 So.2d 655 (Fla. App. D2 1980); *Steele v. Steele*, 250 Ga. 101, 296 S.E.2d 570 (1982); *Beebe v. Chavez*, 226 Kan. 591, 602 P.2d 1279 (1979); *Cunningham v. Cunningham*, 719 S.W.2d 224, writ dism. w.o.j. (Tex. App. Dallas 1986); *Bosse v. Superior Court of Santa Clara County*, 152 Cal. Rptr. 665, 89 Cal.App.3d 440 (1st Dist. 1979).

However, conflicting and confusing state law exists, often varying within the same state, concerning interpretation of Section 6(c) of the UCCJA that a court must stay a child custody proceeding and communicate with the other court in which a simultaneous custody proceeding is pending if the court is informed during the course of its own proceeding of the simultaneous proceeding in the other state. A majority of the state courts which have addressed this issue have held that

noncompliance with the jurisdictional provisions of the UCCJA limits or precludes the authority of the court to exercise jurisdiction over the matter. *Peery v. Peery*, 453 So.2d 635 (La. App. 2 Cir. 1986) (noncompliance with UCCJA limits court's authority); *Wachter v. Wachter*, 439 So.2d 1260 (La. App. 5 Cir. 1983); *In re Marriage of Baisley*, 749 P.2d 446 (Colo. App. 1987) (trial court properly refused to recognize other court's custody order which was entered without communication with trial court); *Tenenbaum v. Sprecher*, 519 N.Y.S.2d 273, 133 A.D.2d 371 (1987) (once court was advised of pending action in another state, it was incumbent upon court to communicate with other court to determine proper forum for jurisdiction); *Snow v. Snow*, 369 N.W.2d 581 (Minn. App. 1985) (South Dakota court lost jurisdiction under UCCJA when it failed to comply with notice provisions of PKPA and UCCJA); *Re Application of Peterson on Behalf of Peterson*, 661 P.2d 40 (Mont. 1983) (Montana court ordered to stay proceedings and to communicate with sister state court to determine jurisdiction); *Paltrow v. Paltrow*, 37 Md.App. 191, 376 A.2d 1134, affd. 338 A.2d 547 (1977) (trial court had an affirmative duty to examine question of pendency of proceedings in other jurisdiction even if issue was not raised by the parties); *E.E.B. v. D.A.*, 446 A.2d 871, 89 N.J. 595, cert. denied, *Angle v. Brown*, 459 U.S. 210, rehearing denied, 460 U.S. 1104 (1982) (better practice is to communicate with court of sister state); *Biggins v. Biggins*, 103 Idaho 550, 650 P.2d 692 (1982) (trial court must determine which state is the more appropriate

forum); *Davis v. Davis*, 53 N.C.App. 531, 281 S.E.2d 411 (1981) (trial court must answer threshold question of whether other state is exercising jurisdiction substantially in conformity with UCCJA); *In re Marriage of Pedowitz*, 225 Cal.Rptr. 186, 179 C.A.3d 992 (5 Dist. 1986) (trial court has *sua sponte* duty to communicate with sister court once it is informed of a custody proceeding pending in another state); *Vanneck v. Vanneck*, 417 N.Y.S.2d 258, 68 A.D.2d 591, affd. 427 N.Y.S.2d 735, 404 N.E.2d 1278 (1979) (incumbent on court to communicate with other court to determine appropriate forum); *Norsworthy v. Norsworthy*, 289 Ark. 479, 713 S.W.2d 451 (1986) (incumbent on court to communicate with sister state prior to proceeding); *Hickey v. Baxter*, 461 So.2d 1364 (Fla. App. 1 Dist. 1984) (case remanded to determine proper forum since courts failed to communicate); *Squires v. Squires*, 12 Ohio App.3d 138, 468 N.E.2d 73 (1983) (trial court improperly assumed jurisdiction when it did not make mandatory inquiry of sister state court which had exercised jurisdiction substantially in conformity with UCCJA); *Decatur v. Decatur*, 453 N.Y.S.2d 764, 89 A.D.2d 742, appeal dismissed 456 N.Y.S.2d 764, 57 N.Y.2d 924, appeal denied 456 N.Y.S.2d 1025, 442 N.E.2d 1277, appeal dismissed 458 N.Y.S.2d 540, 444 N.E.2d 1004, appeal denied 458 N.Y.S.2d 1025, 44 N.E.2d 1012 (1982) (held that state law required court to stay custody proceeding and to communicate with sister state court); *Coppedge v. Harding*, 714 P.2d 1121 (Utah 1985) (trial court required to stay custody proceedings and communicate with sister

state court to determine more appropriate forum as soon as it was apprised of other proceeding); *Rexford v. Rexford*, 631 P.2d 475 (Alaska 1981); *In re Custody of Rector*, 39 Colo.App. 111, 565 P.2d 950 (1977); *In re Marriage of Olmo*, 701 P.2d 866 (Colo. App. 1984); *Morgan v. Morgan*, 666 P.2d 1026 (Alaska 1983); *Matter of Appeal in Pima County Juvenile Action No. J-78632*, 147 Ariz. 584, 712 P.2d 431 (1986) (exercise of jurisdiction without communication with sister state court which had issued prior custody decree was contrary to UCCJA and PKPA).

Other than the instant case, this Petitioner found only five cases where the courts held that a trial court's failure to comply with Section 6(c) of the UCCJA did not limit or preclude that court's ability to exercise or assume jurisdiction of custody proceedings. *Lofts v. Superior Court In and For Maricopa County*, 140 Ariz. 407, 682 P.2d 412 (1984) (court not entitled to assume jurisdiction on ground of sister state court's failure to communicate with it) (*Compare, Matter of Appeal in Pima County Juvenile Action No. J-78632*, 147 Ariz. 584, 712 P.2d 431 [1986]; *Sawie v. Nicholson*, 408 N.W.2d 173 [Minn. App. 1987.]) (*Compare, Snow v. Snow*, 369 N.W.2d 581 [Minn. App. 1985]; *In re Marriage of Corrie*, 32 Wash.App. 592, 648 P.2d 501 [1982] [court did not abuse its discretion in denying the mother communication with the sister state court regarding proper forum]; *Olivo v. Gainey*, 185 Ga.App. 427, 364 S.E.2d 279 [1987] [court not required to stay its

proceeding pending resolution of custody proceeding in sister state]; *Beck v. Beck*, 64 N.C.App. 89, 306 S.E.2d 580 [1983] [sister state court had made no finding of jurisdiction under the UCCJA, thus the court was correct in assuming and maintaining jurisdiction.]) (*Compare*, *Davis v. Davis*, 53 N.C.App. 531, 281 S.E.2d 411 [1981].)

A review of the above case law summary reflects that a majority of state courts have held that a court's authority to make a child custody determination under the PKPA and UCCJA is precluded, or at least limited, if the court fails to comply with the provisions of the PKPA and UCCJA in making its determination. It is important to note that failure to stay proceedings and communicate with the other state court in which a simultaneous custody proceeding is pending pursuant to Section 6(c) of the UCCJA clearly violates the explicit purposes of the PKPA and UCCJA to promote cooperation and aid the exchange of information and avoid jurisdictional competition between the states for the best interest of the child.

In the case at bar, prior to the hearing set on the Respondent's Motion to modify Cadra's custody, the Missouri court was informed through pleadings submitted by Ms. Gregory that a simultaneous custody modification proceeding was pending in Arkansas in which Ms. Gregory asserted jurisdiction under the UCCJA in Arkansas. A copy of the Petition was attached to Ms. Gregory's Amended Response to the Motion. Ms.

Gregory asked the Missouri court to stay its proceeding pending the outcome of the Arkansas proceeding pursuant to the UCCJA. The Arkansas proceeding was discussed at the modification hearing. It is uncontroverted that the Missouri court was informed during the course of its proceeding that a simultaneous custody proceeding concerning Cadra was pending in Arkansas before it assumed jurisdiction. The Missouri court could not have assumed jurisdiction prior to the hearing held on March 10, 1988. Nonetheless, the Missouri court failed to comply with §452.470.3 of the Missouri UCCJA in that it did not stay the proceeding, nor did it communicate with the Arkansas court. To the contrary, the Missouri court ignored the mandate of §452.470.3 by presiding over the hearing, assuming jurisdiction and issuing a modification order. The record does not reflect that the Missouri court communicated with the Arkansas court at any time. It is unlikely the Missouri court communicated with the Arkansas court at all in view of the fact that it was notified on March 8, 1988 of the Arkansas proceeding, just two days prior to the March 10, 1988 hearing.

In spite of the above facts, the Missouri appellate court completely overlooked the mandate of §452.470.3 in finding that it was not incumbent upon the Missouri trial court to stay its proceedings pending the outcome of the Arkansas custody proceeding. Further, the court stated that the record presented to it contained no evidence that the Missouri trial court failed to

communicate with the Arkansas court. In effect, the court simply refused to make a determination as to the preclusion of jurisdiction of the Missouri court to make a custody modification termination due to its failure to comply with §452.470.3. By completely ignoring the provision of §452.463.3, the Missouri court has given the Missouri trial courts carte blanche authority to violate their own state and and, in effect, federal law under the PKPA, in dealing with child custody cases. At least four other states including Missouri have case law on the books allowing their state courts unfettered discretion in staying proceedings and communicating with other state courts in custody cases. This cannot be allowed to continue since it is in direct contravention of the UCCJA and PKPA.

The Court cannot ignore the well documented history of competition between state courts which led to the adoption of the UCCJA and PKPA. The need for jurisdictional standards by this Court is essential. Therefore, this Court must make clear to state courts that they must stay their own proceedings and communicate with other state courts in which simultaneous custody proceedings are pending. They are only allowed discretion under the UCCJA and PKPA in deciding whether to accept or forego jurisdiction if warranted under the provisions of Sections 6 and 7 of the UCCJA. This Court must forewarn state courts that they must stay custody proceedings and communicate with other state courts in which simultaneous child custody

proceedings are pending. State courts must know that failure to communicate with other state courts and stay their own custody proceedings will result in the preclusion of their authority in child custody matters. The present situation in which state courts are constantly competing for jurisdiction in child custody matters results in an increasing number of conflicting state custody decrees and continued animosity between parents, which can only reap disastrous consequences for the children involved.

II.

WHETHER THE PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED WHEN (A) SHE WAS NOT SERVED WITH NOTICE OF CHILD CUSTODY MODIFICATION PROCEEDINGS UNDER THE PKPA AND UCCJA; (B) A DEFAULT JUDGMENT WAS RENDERED AGAINST HER MODIFYING CHILD CUSTODY; AND (C) THE TRIAL COURT DID NOT COMPLY WITH THE UCCJA IN ENTERING THE DEFAULT.

Ms. Gregory contends that the Missouri court decided an important question of federal and uniform law which should be settled by a decision of this Court, or is in conflict with those decisions of this Court interpreting the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Missouri court decided an important question of federal law concerning reasonable notice and opportunity to be heard in contested child custody proceedings under the PKPA and UCCJA which is in conflict with the decisions of other state courts. Ms. Gregory asserts that the failure of the Missouri court to comply with its own state law and, in effect, federal law by not communicating with other state courts and staying its own proceeding violates her guaranteed constitutional due process rights.

Since at least *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), it has been asserted by

this Court that notice and an opportunity for hearing appropriate to the nature of the case is an essential principle of due process. This Court has expressed great concern both for parental rights and the rights of non-resident defendants. These concerns coalesce when the non-resident defendant is a parent claiming custody. This Court has recognized a substantive due process right of parents in their children. *Caban v. Mohammed*, 441 U.S. 380 (1979). Initially, this Court seemed to treat the parents' rights as totally analogous to rights in property. *May v. Anderson*, 345 U.S. 528 (1953). Then, in *Kulko v. Superior Court*, 436 U.S. 84 (1978), the Court applied a minimum contacts test in a child support action brought in California against a non-resident father living in New York. The Court has now firmly established that a parent has a constitutionally protected liberty interest in retaining custody of her child. *Santosky v. Kramer*, 455 U.S. 745 (1982). Further, in *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court held that a parent has a due process right to a custody hearing.

Since *Matthews v. Eldridge*, 424 U.S. 319 (1976), this Court has applied a three-prong test to determine if due process rights have been violated by weighing (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest and the value of any additional or substitute procedural safeguards; and (3) the governmental interest involved. The Court has also found it necessary to consider the applicable laws upon which the state relies. *Connecticut Board of Pardons v.*

Dumschatt, 452 U.S. 458 (1981).

Both the PKPA and the UCCJA provide that the contestants in a child custody proceeding must be given "reasonable notice and opportunity to be heard." See PKPA, 28 U.S.C. §1738A(e) (1980); and *Unif. Child Custody Jurisdiction Act* (U.L.A.) §5 (1988). The Missouri UCCJA specifically provides that when custody modification proceedings are initiated " . . . service shall be obtained . . . as in any original proceeding." §452.455.1 (RSMo 1986). The UCCJA also provides that notice to out-of-state contestants must "be given in a manner reasonably calculated to give actual notice." It then provides the manner in which such notice should be given, including (1) personal delivery; (2) as prescribed by the law of the state; (3) certified or registered mail; and (4) as directed by the court. §452.460.1 (RSMo 1986); *Unif. Child Custody Jurisdiction Act* (U.L.A.) §5 (1988). Further, comments to Section 12 of the UCCJA state that the two prerequisites of the UCCJA are "(1) jurisdiction . . . **and (2) strict compliance with due process mandates of notice and opportunity to be heard.**" *Unif. Child Custody Jurisdiction Act* (U.L.A.) §12, commissioner's note (1988) (emphasis added). Comments to Section 5 state that "Notice and opportunity to be heard must always meet due process requirements. . . ." *Unif. Child Custody Jurisdiction Act* (U.L.A.) §5, commissioner's note (1988).

In the case at bar, Ms. Gregory was never provided

reasonable notice by the Respondent of his Motion or the Missouri custody modification proceedings. Failure to provide such notice violated Ms. Gregory's constitutional right to due process under the Fourteenth Amendment and is in direct contravention to this Court's rulings concerning a parent's right of due process in child custody cases.

Proof of proper service of process and notice is required in child custody cases. *Hickey v. Baxter*, 461 So.2d 1364 (Fla. App. 1 Dist. 1984). Where a father was not notified prior to the entry of a custody order nor served with process at any time, the appellate court found no compliance with the notice provisions of the UCCJA. *Copeland v. Copeland*, 68 N.C.App. 276, 314 S.E.2d 297 (1984). In *Cella v. Cella*, 12 Ark.App. 156, 671 S.W.2d 764 (1984), a New York court's award of custody to the mother was properly denied full faith and credit by the Arkansas court. Notice served on the father's attorney was found insufficient since the mother knew the father's address and should have served him personally.

In the instant case, Ms. Gregory was never served with the Motion or notice of any hearing on the Motion. A copy of the Motion was provided to Charles Niedner, Ms. Gregory's prior attorney. However, such service is insufficient and improper to be deemed actual legal notice on Ms. Gregory. The UCCJA is clear that service must be obtained as in any original proceeding. Further,

the UCCJA provides the type of notice to be given to out-of-state residents.

The Respondent knew at all times the exact address of Ms. Gregory in Hot Springs. In order to effectuate proper service of the Motion on Ms. Gregory, it was incumbent upon the Respondent to deliver a copy of the Motion and summons to her personally or by certified mail under the laws of Missouri and Arkansas.

After receiving the Motion, Mr. Niedner agreed to withdraw formally as Ms. Gregory's attorney on January 29, 1988. He was not required to formally withdraw. He could have simply informed the court that he was no longer Ms. Gregory's attorney, since the modification proceeding was an independent proceeding.

On February 1, 1988, a hearing was held on the Motion. No notice of this hearing date is provided in the record. Ms. Gregory was never served notice of the hearing. It is unclear to this Petitioner why Mr. Niedner, after being dismissed by Ms. Gregory, appeared at the hearing. Under Missouri law, he had no authority to represent Ms. Gregory after being dismissed. Withdrawal or discharge of counsel terminates his authority to act for his client. *Cosby v. Harding*, 553 S.W.2d 535 (Mo. App. 1977). When an attorney is discharged, he no longer acts for his former client. *McLaughlin v. McLaughlin*, 427 S.W.2d 767 (Mo. App. 1968). Since Mr. Niedner was discharged on January 29, 1988, he was

barred from taking any action in the case. His alleged representation of Ms. Gregory at the hearing was totally without her consent or knowledge. The transcript shows that neither Ms. Gregory nor the Respondent was present at the hearing. Any order stemming from the hearing is null and void due to lack of notice to Ms. Gregory and unauthorized representation by her former attorney. Thus, the order of the court dated February 1, 1988 setting the motion for a future unnamed hearing date is null and void.

In any event, Mr. Niedner sufficiently preserved Ms. Gregory's jurisdictional defenses to the Motion at the hearing. He asked the court to stay the hearing pending the outcome of the appeal of the divorce decree. He objected to the court's continued assumption of jurisdiction in the case as provided in the divorce decree. He specifically noted that he did not waive her jurisdictional defenses by appearing at the hearing.

Later, Mr. Niedner notified Ms. Gregory that another hearing date was scheduled for March 10, 1988. Prior to the hearing, Ann P. Faitz entered her appearance as Ms. Gregory's attorney for the sole purpose of challenging the court's jurisdiction. Ms. Gregory objected to the court's continuing assumption of jurisdiction under Missouri law, and specifically, the UCCJA. Through pleadings, Ms. Gregory informed the court of the simultaneous custody proceedings in Arkansas. She asked the court to stay its proceeding as

required by the UCCJA. Ms. Gregory objected to the insufficiency of service upon her of the Motion and all hearings. At no time prior to the March 10, 1988 hearing was either Ms. Gregory or her attorney served with the Motion or notice of the hearing. Why the Respondent did not take measures to properly serve Ms. Gregory or Ms. Faitz since their addresses were well known to the Respondent is a mystery to this Petitioner.

Judge Dalton did not stay the March 10, 1988 hearing. At the hearing, the Respondent did not present any proof of service of the Motion or notice of hearing on Ms. Gregory. No evidence exists that proper service or notice was ever effectuated. Nonetheless, the court completely sidestepped Missouri law and the basis of service of process on out-of-state residents as provided by the UCCJA in holding the hearing and entering a default judgment against her.

Ms. Gregory was never given reasonable notice and opportunity to be heard in the Missouri modification proceeding as provided by the PKPA and UCCJA. Strict compliance with the due process mandate of notice and opportunity to be heard was not adhered to by the Missouri court. Under the *Matthews v. Eldridge* test, a substantial private interest, i.e., Ms. Gregory's liberty interest in her child, was certainly affected. The risk of an erroneous deprivation of that interest was at stake. It would have been extremely easy for the Respondent to use an additional safeguard by properly serving her with

notice since he knew her address. The governmental interest in retaining jurisdiction over the child cannot possibly exceed the important private interest affected of a parent's property and liberty right over her child.

Further, the failure of the Missouri court to comply with the Missouri UCCJA by not communicating with the Arkansas court in which simultaneous custody proceedings were pending and staying its own proceeding until a proper forum could be determined blatantly violates both parties' rights of due process. The UCCJA was promulgated to avoid interstate conflicts in child custody cases and to promote cooperation and information-gathering among the states. It provides a manner of due process for the parents and children involved in order to determine the proper forum to adjudicate custody, keeping in mind the best interests of the children. As previously set out in Part I of this Argument, it is incumbent upon state courts to follow the provisions of the UCCJA and PKPA. State courts must know that failure to do so results in the taking away of the parent's and child's constitutional due process rights. It is clear Ms. Gregory's due process rights were grossly violated. She relies on this Court to uphold those rights.

CONCLUSION

For the foregoing reasons, the Petitioner Ola Jo Gregory respectfully asks this Court to grant her Petition for Writ of Certiorari. Specifically, Ms. Gregory asks that the Court (1) interpret the PKPA and UCCJA for the benefit of all state courts to find that they are precluded from assuming jurisdiction in issuing child custody orders if they fail to comply with the provisions of the PKPA and UCCJA; and (2) protect her guaranteed constitutional procedural due process rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ann P. Faitz, a member of the Bar of the Supreme Court of the United States and attorney for the Petitioner Ola Jo Gregory, certify that pursuant to the Rules of the Supreme Court, three copies each of Petitioner's Petition for Writ of Certiorari to the United States Supreme Court have been mailed by first class mail on October 10, 1989 to the following:

George Warren Gregory through his attorney of record,

Claude C. Knight
118 North Main Street
P. O. Box 953
St. Charles, Missouri 63302

Gordon D. Prinster, Attorney ad Litem
545 Jefferson Street
St. Charles, Missouri 63301

DATED this 10th day of October, 1989

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Appendix

In the Missouri Court of Appeals
Eastern District
Division Two

O.J.G.
Plaintiff-Appellant,
v. Nos. 54090 & 54689
G.W.G.
Defendant-Respondent

Decided April 4, 1989

Before GRIMM, Presiding Judge, KAROHL, Judge and PUDLOWSKI, Chief Judge.

PUDLOWSKI, Chief Judge.

Appellant appeals from a joint custody award pursuant to the original decree of dissolution and from a subsequent modification of the original decree. These two appeals were consolidated for purposes of this opinion. Appellant and respondent were married in 1973. They resided in St. Charles County until their marriage was dissolved in 1987. The parties had a good marriage until their daughter, C.P.G., was born in 1984. After the birth of C.P.G. the marriage began to deteriorate. Appellant began to exclude respondent from the raising of their child and the parties began to argue more. Allegations were also made that respondent had

sexually abused C.P.G. and that respondent had physically abused appellant. Appellant subsequently moved to Hot Springs, Arkansas, with C.P.G. and remained there until the time of the dissolution proceedings.

As part of the dissolution decree the trial court awarded joint legal custody to both parents and ordered C.P.G. to be returned to Missouri. On appeal appellant contends that the trial court erred in granting joint custody and ordering C.P.G. to be returned to Missouri.

Appellant's first point on appeal is that the trial court erred in awarding joint legal custody of the parties minor child, C.P.G., because such custody is not in C.P.G.'s best interest. Appellant contends that the trial court should have awarded primary custody of C.P.G. to appellant and restricted visitation by respondent. Section 452.375 RSMo (1986) provides that the trial court should determine custody according to the best interest of the child. Section 452.375 also defines joint legal custody as "parents shar[ing] the decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child, and, unless allocated, apportioned, or decreed, the parents shall confer with one another in the exercise of decision-making rights, responsibilities, and authority," and further defines joint physical custody as an award to "each of the parents significant periods of time during which a child resides with or is under the care and supervision of each of the

parents. Joint physical custody shall be shared by the parents in such a way as to assure the child of frequent and continuing contact with both parents." Whether to award joint custody in a particular case is in the discretion of the trial court. Joint custody is one of many solutions available to the trial court when trying to resolve a custody problem. Kline v. Kline, 686 S.W.2d 13 (Mo. App. 1984). Moreover, deference is given to the trial court's findings on custody matters unless the appellate court is convinced the best interest of the child requires other action. *Id.*

Appellant argues that because the parties did not agree to joint custody it was not proper for the trial court to make such an award. Section 452.375 provides that the court may award joint legal custody but does not require that there be an agreement between the parties. Just because there is no agreement on joint custody, the court is not without authority to award it. Goldberg v. Goldberg, 691 S.W.2d 312 (Mo. App. 1985). The desire of the parents is only one of several factors to be weighed by the trial court in its sound discretion. Section. 452.375(1).

Appellant contends that the award of joint custody was not proper in this case because the parties were not equipped to deal with each other as equal partners in C.P.G.'s care. The record indicates that respondent was more than willing to do what is necessary for the best interest of his daughter and in the process making the

joint custody plan a working arrangement. The Missouri courts have held that one of the parents should not be able to veto a joint custody award by failing to agree or failing to cooperate with the joint custody determination. Kline v. Kline, 686 S.W.2d 13 (Mo. App. 1983).

Appellant further contends that the joint custody award is not proper because respondent physically attacked appellant and possibly sexually abused C.P.G. The trial court determined after a review of the entire record that those claims did not have merit. There is substantial evidence in the record to support this conclusion on the part of the trial court.

Concerning the physical attack, appellant and respondent both testified at trial and testified differently as to the events that occurred. Concerning the possible sexual abuse of C.P.G., the report of the attending physician at Cardinal Glennon Hospital indicated that the child had temporary swelling of the vaginal orifice. However, testimony was offered that such swelling usually occurs for three to seven days and that respondent had not seen his daughter for nineteen days prior to the examination. The only other evidence presented at trial concerning any sexual abuse were statements by the child. The record indicates that the child was prompted by appellant to make the statements. Due regard is given to the trial court's ability to judge the credibility of the witnesses, accepting or rejecting all, part or none of the testimony. In court tried cases the

judgment is presumed to be correct. Kornberg v. Kornberg, 688 S.W.2d 377 (Mo. App. 1985). The appellate court is entitled to presume that the court studied the evidence thoroughly and ordered what was in the best interest of the child based on the superior opportunity of the trial court to determine the credibility, sincerity, and character of the witnesses, as well as other intangibles not revealed by the record. M.D.R. v. K.K.R., 716 S.W.2d 866 (Mo. App. 1986).

There is nothing in the record to indicate that the trial court abused its discretion in awarding joint legal custody in this case. Moreover, this finding is supported by substantial evidence in the record.

Appellant's second point on appeal is that the trial court erred in failing to grant appellant's request for a home study and to set forth a specific plan containing the terms of the joint custody agreement. In regard to the home study, §452.390 provides that "[t]he court may order an investigation." Moreover, this court has previously held that this section is not mandatory, but is salutary. V.M. v. L.M., 526 S.W.2d 947 (Mo. App. 1975). Nothing in the record indicates the trial court abused its discretion in not awarding a home study.

Concerning the sufficiency of the joint custody plan, Section 452.375.4 provides that a joint custody decree "shall include a specific plan setting forth the terms of such custody." There are, however, no specific

guidelines setting forth what must be included in the plan. Appellant cites a number of articles which set forth model joint custody plans the court should use. We agree that these plans are helpful but that the court should use a case by case approach to determine the best interest of the child and to tailor the plan to meet that interest. We can find nothing in the plan to indicate that the court abused its discretion in the plan it adopted. The plan appears to be designed to be flexible to gradually wean C.P.G. from her dependence on her mother. The plan provides for counseling for all of the parties and sets out the exact times for each parent to have physical custody. The plan also requires progress reports to be filed with the court and that the child be returned to Missouri. The plan before us is not a model joint custody plan but it fits the unique situation before us and serves the best interest of C.P.G. We find that the court's plan is specific enough under §452.375.

Appellant's third point on appeal alleges that the trial court erred in ordering appellant to return C.P.G. to Missouri and not allowing appellant to remove C.P.G. to Arkansas. Appellant argues that it would be in the best interest of C.P.G. to remain in Arkansas because appellant has established a comfortable home and a proper environment in Arkansas. Appellant has part-time employment in Hot Springs and is living rent fee with her mother.

Section 452.377 RSMo provides that a custodial

parent may not change the residence from this state for more than ninety days without court order or written consent from the other parent. The court should allow removal of the child from the state if it is in the best interest of the child. Samuels v. Samuels, 713 S.W.2d 865, 868 (Mo. App. 1986). However, the statute does not require the court to approve the removal simply on the motion of the parent. *Id.* The trial court indicated, in its order, that in the best interest of the child, she should receive counseling with both her natural mother and natural father. Evidence at trial indicated that the child was overly dependent upon appellant and needed to be weaned away from her. The record also indicates that appellant has systematically attempted to remove C.P.G. from respondent's life. Prior to the dissolution, appellant refused to allow the father to eat meals with C.P.G., refused to allow respondent to take C.P.G. to church; refused to allow respondent to read bedtime stories to C.P.G., and refused to allow respondent to play in the yard with C.P.G. unless appellant was present. After filing her petition appellant took C.P.G. to Arkansas and refused telephone contact between C.P.G. and respondent for any extended period of time. It is clear from the record and the order that the trial court thought that it was in the best interest of C.P.G. to have the love and affection of both parents and to have maximum contact with both parents. We must defer to this judgment. M.D.R. v. P.K.R., 716 S.W.2d 866 (Mo. App. 1986). The record also reflects that the trial court concluded that the best way to effectuate the best

interest of C.P.G. was to require appellant to keep C.P.G. in the State of Missouri. We must also defer to the judgment of the trial court on this issue.

Appellant's fourth point on appeal is that the trial court abused its discretion in denying appellant's motion for a new trial because there existed newly discovered evidence showing that C.P.G.'s best interest was at stake. The new evidence offered consisted of two psychologists' reports indicating that C.P.G.'s best interest would be served if she was in the custody of the appellant and if respondent was not allowed to have contact with C.P.G. without supervision. This expert testimony was obtained after the dissolution hearing had been completed. There is nothing in the record to indicate why appellant was not diligent in acquiring this evidence prior to trial. It is an often cited rule in Missouri that motions for new trial on the basis of newly discovered evidence are addressed to the sound discretion of the trial judge, and are viewed with disfavor and are granted only in exceptional cases. City of Eureka v. Hall, 687 S.W.2d 917, 920 (Mo. App. 1985). Moreover, the new trial motion must show: (1) the evidence has only recently been discovered; (2) due diligence would not have uncovered the evidence sooner; (3) the new evidence is so material it would probably produce a different result; (4) the new evidence is not cumulative; and (5) the object of the evidence is not to impeach the character or credit of a witness. *Id.*

Paragraph six of appellant's motion for new trial

states, "[t]hat, since the trial of this cause, Petitioner has been provided with new evidence indicating that it would be in the minor child's best interest for any visits with respondent to be supervised and that the minor child could best overcome her trauma by staying with Petitioner in Arkansas." Appellant further states in her brief that "[t]hese additional expert opinions could not have been produced at trial since [appellant] and [C.P.G.] began seeing the psychologist after the trial." In a strict sense this statement reveals the "new evidence" did not exist at the time of the dissolution hearing. This statement and the record on the whole suggests that the appellant disregarded due diligence in obtaining this expert testimony. Appellant obviously recognized that this type of testimony would be at issue in the case because she had other testimony concerning the same matters. A party is bound and presumed to know the points which will be at issue in the case and by omitting to procure evidence, that ordinary diligence would have uncovered on those points, any subsequent motion for a new trial shall be denied. Curtis v. Curtis, 491 S.W.2d 29 (Mo. App. 1973). We can find nothing in the record to indicate that the trial court abused its discretion in denying appellant's motion for a new trial.

Appellant's fifth point is that the trial court erred in retaining jurisdiction over the custody of C.P.G. for one year and that on its own motion could modify custody without notice to the parties. The decree in relevant part provides "that the Court retain jurisdiction over the

custody of the child for a period of one year from the entry of this order and the Court on its own motion may modify the physical custody of the parties' child without further notice." An essential prerequisite to the modification of a dissolution decree is notice to the party adversely affected. A modification without notice violates due process. Reasonable notice sufficient to meet the requirement of due process must be served on the adverse party or his attorney. Mo. Const. Art. 1, §10; Butler v. Butler, 698 S.W.2d 545, 550 (Mo. App. 1985). Moreover, §452.455.2 (RSMo 1986) provides that:

> "Before making a decree under the provisions of section 452.410, or sections 452.440 and 452.450, the litigants, any party whose parental rights have not been previously terminated, and any person who has physical custody of the child must be served in the manner provided by the rules of civil procedure and applicable court rules."

This decree attempts to eliminate a necessary element of the due process requirement. We, therefore, modify the dissolution decree by removing that part of the decree allowing the trial court to modify the decree without notice to the parties.

The decree of dissolution was filed on November 4, 1987 and appellant timely filed an appeal on December 17, 1987. On January 20, 1988, respondent filed a motion

to amend the decree, requesting physical custody of C.P.G. be transferred to him and the order for child support payments to appellant be terminated. On February 1, 1988, Mr. Charles Niedner entered his appearance on behalf of appellant and argued against the motion to amend the decree asking that the court hold an evidentiary hearing and to change the motion to a motion for a modification because of changed circumstance. Later the same day Mr. Niedner motioned the court to withdraw from the case and the motion was granted on February 19, 1988. The motion was set for argument on March 10, 1988. Prior to the hearing, appellant, by her new attorney, filed a response to the motion. The response challenged the courts jurisdiction to modify the decree claiming that appellant was not properly served with notice of the action. Appellant failed to appear at the hearing on March 10 and the trial court modified the decree changing the custody of C.P.G. to respondent and terminating respondent's obligation to pay child support to appellant.

Appellant appeals arguing that the trial court did not have jurisdiction over the action because she was never served with notice of the action. Respondent argues that Mr. Niedner's appearance on appellant's behalf at the February 1 hearing waives any challenge to lack of personal jurisdiction. Appellant contends that she had discharged her attorney, Mr. Niedner, prior to the February 1 hearing, therefore, any appearance before the court on his part was beyond his scope of authority.

The only evidence presented in the record consists of statements made in appellant's brief and a letter written by Mr. Niedner to appellant stating: "In accordance with our telephone conversation of January 29, 1988, I am hereby enclosing motions to withdraw from any further representation in both the appeal and the motion to amend the divorce decree." Appellant has the burden of affirmatively establishing reversible error and has the duty of providing an appellate court with a record containing everything necessary to the determination of the issues presented it. Hempe v. Cape, 702 S.W.2d 152, 157 (Mo. App. 1985). The record presented to this court is insufficient to make a determination as to whether Mr. Niedner was acting on the part of the appellant. It is appellant's duty to supply a record from which we can make a determination. Having supplied the trial court and this appellate court with an insufficient record we cannot find error on the part of the trial court in determining that Mr. Niedner was appearing under appellant's authority. *Id.*

Having determined that Mr. Niedner was appellant's attorney on February 1, we now must determine whether this appearance waived appellant's right to attack the jurisdiction of the trial court for lack of personal service. Rule 55.27(g) provides that a

defense of insufficiency of service of process is waived if it is omitted from a motion or responsive pleading. At the February 1, 1988 hearing in response to respondent's motion, Mr. Niedner raised the following defenses: 1) the court lacked subject matter jurisdiction; 2) the matter should be stayed during the appeal of the original decree; and 3) the respondent had requested the improper remedy. Moreover, Mr. Niedner affirmatively asked the court to grant appellant an evidentiary hearing. Under these facts appellant waived her right to challenge the lack of service of process under Rule 55.27(g).

Appellant also contends that the trial court should have stayed proceedings on the motion pending the outcome of the appeal and a custody proceeding filed in Arkansas.[1] We find this point to be without merit. Rule 81.09 denotes when an appeal shall stay an execution. Rule 81.09 provides:

> Appeals shall stay the execution in the following cases: (1) when the appellant shall be an executor or administrator, guardian, or curator, and the action shall be by or against him as such, or when the appellant shall be a county, city, town, township, school district, or other municipality; (2) when the appellant at, or prior to the time of filing notice of appeal, presents

[1]Appellant filed an action for custody of C.P.G. in the Chancery Court of Garland County Arkansas on February 23, 1988. The outcome of the suit is still pending.

to the court for its approval a supersedeas bond which shall have surety or sureties as the court requires.

Appellant admits that the filing of a notice of appeal does not automatically stay execution on a judgment during the pendency of the appeal. Moreover, although a motion to modify a decree of custody continues from the original action, such a petition constitutes an independent proceeding. Burchett v. Burchett, 572 S.W.2d 494 (Mo. App. 1978).

Appellant further contends that the court lacked subject matter jurisdiction to hear the case because the child had been outside of the state for more than six months prior to the filing of the motion to modify. Section 452.450 provides that a court has jurisdiction to modify a decree if this state was "the child's home state within six months before commencement of the proceeding and the child is absent from this state for any reason and a parent or person acting as parent continues to live in this state." The record indicates that appellant moved out of Missouri on August 1, 1987 and that the motion to modify was filed January 20, 1988. The motion was filed a full 11 days prior to the end of the six months time frame set out by the statute. Appellant argues that the six month time elapsed because three weeks prior to leaving for Arkansas she moved out of the marital home and into a motel in Missouri while planning her move to Arkansas with C.P.G. Even though she had moved out of

the marital home she remained domiciled in the state in compliance with the statute. We find that the trial court had subject matter jurisdiction under §452.450.

Appellant's final contention is that the trial court erred in entering a default judgment and modifying the decree by: 1) Failing to examine all pleadings and information supplied by O.J.G. to it, including filed objections and defenses and copies of letters from psychologists sent directly to the trial court; (2) failing to inform the chancery court of Garland County, Arkansas of the default judgment; and (3) awarding greater and different relief in the default judgment other than that requested by the respondent's motion. Section 452.465 provides that "Before hearing the petition in a custody proceeding, the court shall examine the pleadings and other information supplied by the parties." Further "If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court in order that issues may be litigated in the more appropriate forum." Once again the record appellant has presented this court is devoid of any competent evidence from which we can find any error. Hempe v. Cape, 702 S.W.2d 152, 157 (Mo. App. 1985). As to whether greater relief was granted than requested, all the relief granted is consistent with the court's authority under §452.375. We find no error on the part of the trial court.

The opinion of the trial court is affirmed in part

and modified in part.

In the Missouri Court of Appeals
Eastern District

Decided May 2, 1988

Re: Motions for rehearing and/or transfer to Supreme Court denied:

1. 54090 – Gregory, Ola Jo, App.
vs. Gregory, George Warren, Resp.

In the Supreme Court of Missouri

No. 71675
ED 54090 and 54689
Decided June 13, 1988

O.J.C., Plaintiff-Appellant,
vs. TRANSFER
G.W.G., Defendant-Respondent.

Now at this day, on consideration of Plaintiff-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

THOMAS F. SIMON, Clerk.

In the Circuit Court
Of the County of St. Charles, Missouri

Circuit Judge Division
Cause No. CV187-1762DR

Ola Jo Gregory,
SSN: 431-04-3962
Petitioner,
and
George Warren Gregory,
SSN: 494-50-1787
Respondent.

Decided November 4, 1987.

Dalton, Circuit Court Judge.

DECREE OF DISSOLUTION

Now on this 30th day of September, 1987, comes the Petitioner, in person, with her attorney, Charles W. Niedner, Respondent appears in person, with attorney Claude C. Knight. Guardian Ad Litem, Gordon D. Prinster, appears in person on behalf of Cadra Peterson Gregory. Whereupon this cause coming on regularly to be heard and being called, the parties announce ready for trial. Thereupon the parties submit the cause to the

Court upon pleadings and proof and the Court, after hearing the evidence, finds that Petitioner and Respondent have been residents of this State for at least ninety (90) days next preceding the commencement of this action and that more than thirty (30) days have elapsed since the filing of the petition herein and service of same upon Respondent. That there remains no reasonable likelihood that the marriage between the parties can be preserved and that the marriage is, therefore, irretrievably broken. The Court further finds that neither party is a member of the Armed Forces of the United States; that there one child born of said marriage, to-wit: CADRA PETERSON GREGORY, born April 13, 1984, presently in the custody of Petitioner and that Petitioner is not now pregnant. The Court further finds that there is marital property to be divided. To the extent it has jurisdiction, the Court has considered provision for child custody, support of any child entitled to support, maintenance of either party and the disposition of marital property as provided by law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the marriage of OLA JO GREGORY and GEORGE WARREN GREGORY be and is dissolved.

The Court finds that the parties' minor child is overly dependent upon the natural mother and that it would be in the best interests of the child, based upon

medical evidence, that the child receive counseling with both the natural mother and natural father; that it would be in the best interest of the child, and IT IS ORDERED, that the child be placed in the joint legal custody of both parties and that the child shall not be allowed to be removed from the State of Missouri and that the child shall be returned to the State of Missouri by Petitioner within fifteen days of the entry of this order; that the child shall be placed in the physical custody of the natural mother subject to the natural mother and child participating in counseling on a regular basis for a period of one year from the entry of this order, further subject to the natural father's right of temporary physical custody each Sunday from 9:00 a.m. to 6:00 p.m. commencing November 15, 1987, for a period of six months, thereafter, the natural father shall have temporary physical custody on alternate weekends from 6:00 p.m. Friday to 6:00 p.m. Sunday, alternate legal holidays and four weeks during the summer months commencing in the year 1988 upon thirty days' written notice. Further, that the natural father shall participate in counseling with the minor child on a regular basis for period of one year from the entry of this order; that the Court retains jurisdiction over the custody of the child for a period of one year from the entry of this order and the Court on its own motion may modify the physical custody of the parties' child without further notice. It is further ordered that the counselor file a written progress report with the Court every other month commencing with the month of December, 1987. Petitioner and

Respondent shall each pay for their own counseling.

The residence of said child shall not be changed from the State of Missouri, nor shall said child be removed from the State of Missouri for more than ninety (90) days, without prior specific authorization of the Court or written consent of the noncustodial parent.

In the Circuit Court
Of St. Charles County, Missouri
Division 4

No. CV 187-1762 DR

Ola Jo Gregory, Petitioner

vs.

George Warren Gregory, Respondent

DECIDED December 3, 1987

DALTON, Circuit Court Judge

Petitioner's Motion for New Trial Or, In the Alternative, Motion to Amend Decree of Dissolution called, argued and overruled. Respondent's Motion to Amend Decree called, argued and overruled.

In the Circuit Court
Of St. Charles County, Missouri
Division 4

No. CV 187-1762 DR

Ola Jo Gregory, Petitioner,

vs.

George Warren Gregory, Respondent.

Decided February 1, 1988

DALTON, Circuit Court Judge.

Upon Motion, Respondent's Motion to Amend Decree to be considered as a Motion to Modify, is hereby ordered to be set for hearing. Petitioner ordered to produce said child in court for said hearing.

In the Circuit Court
Of St. Charles County, Missouri
Division 4

No. CV 187-1762 DR

Ola Jo Gregory, Petitioner,

vs.

George Warren Gregory, Respondent

DECIDED February 19, 1989

DALTON, Circuit Court Judge

Motion of Niedner, Niedner, Allheim and Bodeux to withdraw as attorneys for Petitioner called, submitted and granted.

In the Circuit Court
Of St. Charles County, Missouri
Circuit Judge Division

No. CV187-1762DR

In Re: The Marriage of
Ola Jo Gregory
Petitioner

vs.

George Warren Gregory
Respondent

DECIDED March 10, 1988

DALTON, Circuit Court Judge

ORDER OF MODIFICATION
OF DECREE OF DISSOLUTION

Now on this 10th day of March, 1988, comes on regarding the Respondent's Motion to Amend and/or Modify Decree of Dissolution, Respondent announces ready for trial, appears in person and with his attorney, Claude C. Knight, also appears Gordon Prinster, guardian ad litem for the minor child of the parties, Cadra Peterson Gregory, born April 13, 1984, Petitioner fails to appear. Thereafter, the cause comes on regularly

to be heard and after a review of the pleadings and hearing the evidence, the Court finds as follows:

1. That the Court entered its original Decree of Dissolution between the parties on the 4th day of November, 1987, and in which decree both Petitioner and Respondent were granted joint legal custody of the minor child, Cadra Peterson Gregory, born April 13, 1984, with certain rights of physical custody in each of the parties hereto.

2. That Petitioner's attorney entered his appearance in regard to this pending motion to amend and agreed that same should be set for trial and considered in the alternative as a Motion to Modify, all on February 1, 1988.

3. That Respondent was given notice by her previous attorney by letter dated February 10, 1988, of this hearing date and was further informed to produce the parties' minor child at this hearing.

4. That Petitioner has failed to produce the child at this hearing.

5. That this Court retained jurisdiction over the custody of the child for one year from the entry of the Decree of Dissolution.

6. That this Court's decree of November 4, 1987,

ordered Petitioner to return the child to the State of Missouri; that the child was not to be removed from the State of Missouri; and that the parties and child were to participate in counseling, all of which Petitioner has willfully violated by removing the child from the State of Missouri and failing to participate in counseling, while Respondent has used every reasonable effort to comply with the Court's orders.

7. That the Court finds that Respondent is a fit and proper person to have the joint legal custody of the parties' minor child, and to have the physical custody of said minor child, while the Court finds that Petitioner and her conduct are detrimental to said child, and not in the best interest of said child.

THEREFORE, IT IS ORDERED AND ADJUDGED that the original Decree of Dissolution be modified and/or amended in the following respects:

(1) Legal physical custody of Cadra Peterson Gregory is hereby awarded to Respondent.

(2) Respondent shall be allowed to claim the child as an exemption for income tax purposes.

(3) Respondent's obligation to pay Petitioner child support is hereby terminated until further Court order.

(4) Petitioner is ordered to return Cadra Peterson

Gregory to the custody of Respondent immediately.

(5) Petitioner is granted physical custody each Saturday from 9:00 a.m. to 6:00 p.m. in the presence and supervision of the Respondent only until further Court order.

(6) The parties are ordered to perform the counseling provision of the original decree.

(7) Further, the Court retains jurisdiction over the physical custody of the child as set forth in the original decree for one additional year from the date hereof.

Costs to Petitioner.

452.455 Petition for modification—procedure

1. Any petition for modification of child custody decrees filed under the provisions of section 452.410, or sections 452.440 to 452.450, shall be verified and, if the original proceeding originated in the state of Missouri, shall be filed in that original case, but service shall be obtained and responsive pleadings may be filed as in any original proceeding.

2. Before making a decree under the provisions of section 452.410, or sections 452.440 to 452.450, the litigants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child must be served in the manner provided by the rules of civil procedure and applicable court rules and may within thirty days after the date of service (forty-five days if service by publication) file a verified answer. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to section 452.460.

(L. 1978, p.690, H.B.No. 914, §4. Amended by L. 1979, p. 621, S.B.No. 154, §1, eff. March 6, 1979.)

HISTORICAL NOTE

The 1979 amendment rewrote the section which formerly provided:

"Before making a decree under this act, reasonable notice and opportunity to be heard shall be given to the litigants, any parent whose parental rights have not been previously terminated, any child twelve years of age or older, and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to section 5 of this act."

UNIFORM LAW:

This section is similar to §4 of the Uniform Child Custody Jurisdiction Act, see 9 Uniform Laws Annotated, Master Edition.

Uniform Child Custody Jurisdiction Act §452.455 (RSMo 1986) based on *Unif. Child Custody Jurisdiction Act* (U.L.A.) §4 (master ed. 1988).

452.460. Notice to persons outside this state—submission to jurisdiction

1. The notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be given in any of the following ways:

(1) By personal delivery outside this state in the manner prescribed for service of process within this state;

(2) In the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) By certified or registered mail; or

(4) As directed by the court, including publication, if other means of notification are ineffective.

2. Proof of service outside this state may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof of service may be a receipt signed by the addressee or other evidence of delivery to the addressee.

3. The notice provided for in this section is not required for a person who submits to the jurisdiction of the court.

(L. 1978, p. 690, H.B. No. 914, §5. Amended by L. 1979, p. 621, S.B. No. 154, §1, eff. March 6, 1979.)

HISTORICAL NOTE

The 1979 amendment deleted former subsec. 2 and renumbered former subsecs. 3 and 4 as subsecs. 2 and 3, respectively.

Prior to the 1979 amendment subsec. 2 provided:

"Notice under this section shall be served, mailed, delivered, or last published at least twenty days before any hearing, other than for temporary orders, in this state."

UNIFORM LAW:

This section is similar to §5 of the Uniform Child Custody Jurisdiction Act, see 9 Uniform Laws Annotated, Master Edition.

Uniform Child Custody Jurisdiction Act, §452.460 (RSMo 1986); *Unif. Child Custody Jurisdiction Act* (U.L.A.) §5 (master ed. 1988).

452.465. Simultaneous proceedings in other states

1. A court of this state shall not exercise its jurisdiction under sections 452.440 to 452.550 if, at the time of filing the petition, a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with sections 452.440 to 452.550, unless the proceeding is stayed by the court of that other state for any reason.

2. Before hearing the petition in a custody proceeding, the court shall examine the pleadings and other information supplied by the parties under section 452.480 and shall consult the child custody registry established under section 452.515 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state, it shall direct an inquiry to the state court administrator or other appropriate official of that state.

3. If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction, it shall stay the proceeding and communicate with the court in which the other proceeding is pending in order that the issue may be litigated in the more appropriate forum and that information may be exchanged in accordance with sections 452.530 and 452.550. If a court of this state has

made a custody decree before being informed of a pending proceeding in a court of another state, it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court in order that the issues may be litigated in the more appropriate forum.
(L. 1978, p. 691, H.B. No. 914, §6.)

HISTORICAL NOTE

UNIFORM LAW:

This section is similar to §6 of the Uniform Child Custody Jurisdiction Act, see 9 Uniform Laws Annotated, Master Edition.

Uniform Child Custody Jurisdiction Act, §452.465 (RSMo 1986); *Unif. Child Custody Jurisdiction Act* (U.L.A.) §6 (master ed 1988).

452.470. Inconvenient forum

1. A court which has jurisdiction under this act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

2. A finding that a court is an inconvenient forum under subsection 1 above may be made upon the court's own motion or upon the motion of a party or a guardian

ad litem or other representative of the child. In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction.

3. Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court, with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

4. If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

5. The court may decline to exercise its jurisdiction under this act if a custody determination is incidental to an action for dissolution of marriage or another proceeding while retaining jurisdiction over the dissolution of marriage or other proceeding.

6. If it appears to the court that it is clearly an

inappropriate forum, it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

7. Upon dismissal or stay of proceedings under this section, the court shall inform the court found to be the more appropriate forum of this fact or, if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

8. Any communication received from another state informing this state of a finding that a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

(L. 1978, p. 691, H.B. No. 914, §7. Amended by L. 1979, p. 621, S.B. No. 154, §1, eff. March 6, 1979.

HISTORICAL NOTE

The 1979 amendment substituted "dissolution of marriage" for "divorce" twice in subsec. 5.

UNIFORM LAW:

This section is similar to §7 of the Uniform Child Custody Jurisdiction Act, see 9 Uniform Laws Annotated, Master Edition.

Uniform Child Custody Jurisdiction Act §452.470 (RSMo 1986) based on *Unif. Child Custody Jurisdiction Act* (U.L.A.) §7 (master ed. 1988).

In the Circuit Court
Of St. Charles County, Missouri

No. CV 187-1762

Ola Jo Gregory,
Petitioner

v.

George Warren Gregory,
Respondent

TRANSCRIPT OF DEPOSITION
OF JUDY TINDALL, PH.D.
TAKEN ON BEHALF OF THE PETITIONER
ON SEPTEMBER 10, 1987
(pp. 6-8)

DR. TINDALL: . . . After meeting with Cadra and her mother, and also talking with her grandmother . . . I believe[d] that . . . Cadra's extremely dependent upon her mother at the present time and . . . would be very much traumatized by an overnight separation. . . . I also have some concern that there may be a possibility of some sexual abuse . . . by the father. . . .

Q. Did Cadra herself indicate to you that there was touching in her vaginal area by her father?

A: By simply pointing . . . right in that area.

Letter to Charles Niedner
From John Russ, Ed.D.

November 7, 1987

I am writing regarding three psychological counseling sessions I've had with Ms. Cadra Gregory on October 20 and 26 and November 6, 1987.

The first session was at my office. Cadra came in with her mother, Ms. Ola Jo Gregory and her grandmother, Mrs. Ella Peterson. Cadra was experiencing such a heightened state of anxiety and panic that she was unwilling for her mother and grandmother to leave the room and talk with me alone. Numerous times during the session Cadra said she had been "tickled" by her father and she was very frightened about it. I asked where he tickled her and she pointed to the vaginal area. Her anxiety level was so high that she could not sit still and she cried most of the session. For the second session I asked her mother and grandmother if I could come to their home and visit with Cadra and they agreed. Her anxiety was comparable to the first visit but she did spend approximately fifteen minutes alone with me in the yard. She again said she thought a lot about it when her dad "tickled" her. When I asked her specifically what happened—she said he hit me twice and pointed to the vaginal area. My third and last visit with Cadra was November 6 at the home of her grandmother. Her anxiety was less than our previous visits but again

she said she was worried about her dad tickling her. I asked what she did to make herself feel better when she felt worried about this issue. She said that it helped when she got under the cover in bed, that it also helped to hold her cat, and that at times it helped to have her mother hold her tight.

Cadra is obviously traumatized by the tickling from her father. It is my opinion that she needs counseling on a regular basis for an indefinite period of time. It is my further opinion that any visitation by her father be under strict supervision and that these visits not include any over night stay at this time. Since Cadra does have a stable home environment here and her mother is able to have employment here, it it my belief that her chances of overcoming this trauma would be significantly better here.

Because Cadra's emotional health is so precarious, I have agreed that another professional here should meet with her and forward a written evaluation to you. It is my opinion that Cadra can certainly be helped by counseling but the healing process may take years.

Letter to Charles Niedner
From Verlin L. Anthony, Ed.D.

November 10, 1987

I am writing you at the request of Ms. Ola Jo Gregory, Cadra's mother.

Cadra was seen this date in my office for observation. She is a very bright and verbal, three-and-one-half-year-old child. Cadra was brought to me for consultation because she is extremely emotional and insecure; and because she is having nightmares on a regular basis. (She reports her nightmares are about her father's "tickling," but will elaborate no further.)

Cadra talked in a whiney voice and appeared to be near panic when she could not be near her mother (even when her grandmother was with her). She told this worker about her father's "tickling her," pointing to her vaginal area. She also indicated that her father "spanked her there." After telling this worker, she immediately wanted to leave the subject and complained of being very tired.

This worker asked Cadra if she would like to see her father and she had a pronounced negative reaction and seemed overtly disturbed by the suggestion of seeing him. It is my opinion that Cadra has experienced

emotional trauma in some way relative to her father. I feel it would be detrimental to Cadra's emotional well-being if she were forced to visit her father at this time.

In my opinion, Cadra is in need of further counseling. She has seen Dr. John Russ in the past and will continue seeing him along with her mother.

Letter to Ola Gregory From Charles Niedner

February 1, 1988

In accordance with our telephone conversation of January 29, 1988, I am hereby enclosing motions to withdraw from any further representation in both the appeal and the motion to amend the divorce decree.

In regard to the appeal, the full record was filed with the Missouri Court of Appeals, 111 North Seventh Street, St. Louis, MO 63101, (314-444-6960) on or about January 16, 1988. Your brief must be filed within sixty days of that date. If no brief is filed, the appeal will be dismissed and the trial court's ruling will stand. If you wish to pursue the appeal, I urge you to retain a new attorney quickly.

In regard to the motion to amend the decree, that matter will be set for hearing sometime in March. I do not yet know the exact date. Again, I urge you to retain new counsel to represent you in that matter.

P.S. Enclosed is a copy of a Court Order ordering that you bring Cadra with you for the hearing in March.

In the Circuit Court
Of St. Charles County, Missouri
Circuit Judge Division

Cause No. CV 187-1762 DR
Division No. 4

Ola Jo Gregory,
Petitioner

vs.

George Warren Gregory,
Respondent

Filed: February 1, 1988

MOTION TO WITHDRAW

Comes now Niedner, Niedner, Alheim & Bodeux, by Charles W. Niedner, and requests leave of court to withdraw as counsel of record for Petitioner under Rule 4, §1.16(b)(1&3).

CHARLES W. NIEDNER

In the Circuit Court of Missouri
Eleventh Judicial Circuit—Division 4

Cause No. CV 187-1762 DR

Ola Jo Gregory, Petitioner

v.

George Warren Gregory, Respondent

TRANSCRIPT OF HEARING
HELD FEBRUARY 1, 1988
(pp. 3-5)

DALTON, Circuit Court Judge

MR. NIEDNER: Your Honor, my response, first of all, is I have to object to this motion, firstly, because this concept of the Court's trial—Court's continuing jurisdiction is on appeal. The whole decision, first of all, is on appeal concerning temporary custody; the requirement of not being allowed to return to Arkansas, and, in particular, the concept that the Court has continuing jurisdiction and can, I suppose, on its own motion or some non-testimony matter like this, change custody. That's on appeal and I think it's really, technically, out of the Court's hands until that has been decided on appeal.

Secondly, I think the proper remedy—or, proper procedure would be for Mr. Knight's client to file a motion to modify because of changed circumstances, if that is, in fact, his argument. . . .

Finally, in addition to the first two points, I believe my client would be entitled to an evidentiary hearing, which is not provided for on law day, when this was requested upstairs. I pointed out to the judge calling the civil docket that this should be a matter set for a hearing with evidence and that judge simply assigned the case to you to consider that matter.

Next, on the merits, you might say, and without waiving any of these objections . . . first of all, I don't think the Court has jurisdiction to take up this matter, because it's on appeal, and because no motion to modify has been filed, but, secondly, if the Court would decide to take up this issue, I think that Mrs. Gregory's entitled to an evidentiary hearing.

In the Chancery Court
Of Garland County, Arkansas
No. 88-

OLA JO P. GREGORY PETITIONER

VS.

GEORGE WARREN GREGORY RESPONDENT

Filed February 23, 1988

PETITION FOR CUSTODY INVOKING THE UNIFORM CHILD CUSTODY JURISDICTION ACT

1. Petitioner, OLA JO P. GREGORY, is an individual residing in the City of Hot Springs, County of Garland, State of Arkansas, August 1, 1987.

2. Respondent, GEORGE WARREN GREGORY, is an individual residing in the City of St. Charles, County of St. Charles, State of Missouri.

3. The parties were married on the 9th day of June, 1973 and have lived separate and apart since the 9th day of July, 1987; however, an action for Divorce was filed on 17th day of March, 1987.

4. The Petitioner and Respondent were formerly

Husband and Wife, and were divorced by entry of a Decree of Dissolution entered on the 4th day of November, 1987 by the Circuit Court in the City of St. Charles, in the County of St. Charles, in the State of Missouri.

5. Petitioner and Respondent are the parents of CADRA PETERSON GREGORY, whose date of birth is April 13, 1984.

6. The child presently resides with Petitioner in the City of Hot Springs, County of Garland, State of Arkansas and has resided under the primary care and custody of her mother in the City of Hot Springs, County of Garland, State of Arkansas since August 1, 1987.

7. Pursuant to the Decree of Dissolution entered on the 4th day of November 1987, the parties' minor child, CADRA, was placed in the physical custody of Petitioner; however, the Court further placed the child in Joint Legal Custody of both parties. Joint Legal Custody as well as other Orders entered in said Decree of Dissolution are presently under Appeal the full record was filed with Missouri Court of Appeals on or about the 16th day of January, 1988 and Pleadings have been filed in St. Charles County Circuit Court Cause No. CV187-1762DR to stay any further actions by said Court pending a ruling by the Missouri Court of Appeals.

8. Petitioner believes that the best interest and

welfare of the parties' minor child will be promoted if permanent custody of the child is awarded to Petitioner for the following reasons:

(a) Pursuant to Ark. Code Ann. §9-13-201(3) (1987) Arkansas is the state in which the minor child, CADRA, and Petitioner have the closest connection and where significant evidence concerning her care, protection, training, and personal relationships are most readily available in that her maternal grandmother lives in the City of Hot Springs, County of Garland, State of Arkansas and her mother resided in City of Hot Springs, County of Garland, State of Arkansas all her life until her marriage in 1973 in Arkansas and presently Petitioner is employed in Garland County and has rekindled the strong roots and ties she has with the community. Copies of the Professional Evaluations are attached hereto and incorporated herein by references as Petitioner's Exhibit:

1.— Psychological Report by Judy Tindall, Ph.D., Licensed Psychologist conducted 28th day of May, 1987.

2.— Evaluation by Sam Clinic conducted 28th day of July, 1987.

3.— Observation by Verlin L. Anthony, Ed.D., Chief Psychologist conducted 10th day of November, 1987.

4.— Psychological counseling by John Russ, Ed.D. conducted 31st day of December, 1987 and on going.

(b) Pursuant to Ark. Code Ann. §9-13-201(4) (1987), Petitioner believes in the interest of greater stability of home environment and of secure family relationships for the parties' minor child, Arkansas should invoke jurisdiction over mother and child;

(c) Pursuant to Ark. Code Ann. §9-13-202(5) (1987) Arkansas is the home state for Petitioner and Child in that Petitioner and Child have resided in Arkansas for at least six (6) consecutive months and therefore, under the Child Custody Jurisdiction Act, Arkansas is the "Home State."

(d) Pursuant to Ark. Code Ann. §9-13-203(1) (1987) Arkansas is the home state of the minor child, CADRA PETERSON GREGORY; Arkansas has been the home state within six (6) months before commencement of this Petition and (2) it is in the best interest of parties minor child that a Court of this State assume jurisdiction because the Child and Petitioner have a significant connection with Arkansas State and there is available in this State substantial evidence concerning the child's present and future care, protection, training, and personal relationships.

9. Petitioner requests that until a decision is reached by the Missouri Court of Appeals this Court enter an interlocutory Order allowing Petitioner and her minor child, CADRA PETERSON GREGORY, to remain in her permanent custody in Arkansas, subject to Respondent's reasonable restricted visitation with the parties minor child and that jurisdiction of this Court be found to rightfully be evoked pursuant to the Child Custody Jurisdiction Act. An Affidavit of Petitioner is attached hereto and marked for identification purposes as Petitioner Exhibit 5, which correctly recites the correct information under oath to be submitted to this court pursuant to Ark. Code Ann. §9-13-209.

10. Petitioner requests that upon a Hearing concerning her Petition the Court find that Arkansas is the more appropriate forum concerning all issues dealing with the parties' minor child and that the St. Charles County Circuit Court should no longer retain pending jurisdiction in that all significant connections concerning the minor child's welfare and best interest exist in Arkansas.

11. Petitioner further requests that pending a decision by the Missouri Court of Appeals this Court modify the Custody Decree of Missouri finding that the Garland County Chancery Court has jurisdiction over the Petitioner and the Petitioner's minor child under the jurisdiction prerequisites substantially in accordance with the Uniform Child Custody Jurisdiction Act that it is in

the best interest of the parties' minor child that she remain under the care and custody of the Petitioner.

WHEREFORE, Petitioner respectfully request the Court to award her permanent custody of the minor child, Cadra Peterson Gregory, and to enter an Interlocutory Order staying any action from being taken by the St. Charles County Circuit Court pending an Appeal Decision being rendered by the Missouri Court of Appeals; that the Court find Arkansas is the more appropriate forum and Missouri should no longer retain pending jurisdiction; that pending a decision by the Missouri Court of Appeals, this Court modify the Custody Decree of Missouri finding this Court has jurisdiction over Petitioner and Petitioner's minor child, having met the jurisdictional prerequisite in accordance with the Uniform Child Custody Jurisdiction Act; that until the time the parties' minor child, CADRA PETERSON GREGORY, be allowed to reside under the care and custody of Petitioner in the State of Arkansas; subject to reasonable restricted visitation by Respondent; together with all other just and equitable relief to which she may be entitled.

VICKI S. COOK
Attorney for Petitioner

In the Chancery Court
Of Garland County, Arkansas
No. 88-

OLA JO P. GREGORY PETITIONER

VS.

GEORGE WARREN GREGORY RESPONDENT

AFFIDAVIT IN SUPPORT OF PETITION FOR CUSTODY INVOKING THE UNIFORM CHILD CUSTODY JURISDICTION ACT

OLA JO P. GREGORY, after having been duly sworn, states:

1. My name is OLA JO P. GREGORY and if I were called to Court to testify, my statements would be substantially the same as these contained herein.

2. This affidavit is attached to my Petition pursuant to Ark. Code §9-13-209 (1987).

3. My name is OLA JO P. GREGORY. I am the mother of CADRA PETERSON GREGORY whose date of birth is April 13, 1984.

4. Since CADRA's birth I have been the primary

caretaker of CADRA in that I have had sole responsibility for bathing, dressing, feeding, and caring for each of her needs.

5. On or about January 30, 1987, my Husband, GEORGE WARREN GREGORY, attempted to strangle me and push me down the stairs at our home, previous to this time he had not demonstrated such behavior. Thereafter, I filed for Divorce against GEORGE WARREN GREGORY on the 17th day of March 1987, but he refused to leave our home and when my daughter informed me that she was afraid of her father because he had been tickling her on her vaginal area, I then immediately took her to an area psychologist. On or about July 9, 1987, when my daughter informed me there was physical abuse as well as sexual abuse from her father, I moved out of my residence to Howard Johnson's in St. Charles.

6. Thereafter, on or about July 28, 1987, my daughter was evaluated at SAM CLINIC, copies of professional evaluations concerning CADRA are attached to my petition.

7. When I moved to Howard Johnson's, my mother, ELLA D. PETERSON, accompanied me and my daughter, CADRA. My mother had been with me since January 1987, and my mother and my daughter, CADRA, have a very close grandmother/granddaughter relationship in that in 1984, when CADRA was born, she

stayed with me at my mother's home from July 1984 through or until September 1984 and again at Christmas 1984 over a month was spent at my mother's home. In 1985, while my mother attended school at Henderson State University, CADRA and I stayed with my mother for over a six (6) weeks period. Again, in 1986, CADRA and I stayed with my mother for over a month, and throughout her life, my daughter and my mother have enjoyed playing together and sharing many outings with one another. Therefore, I decided in the best interests of my daughter's stability and general welfare, it would be best for my daughter and me to move back to Arkansas, and we began residing with my mother in Hot Springs on August 1, 1987, at 102 Wildwood Avenue, Hot Springs, Arkansas 71913 and we continue to reside with her there.

8. Since CADRA's birth in April of 1984 she and I resided at 3135 Arrow Rock, St. Charles, Missouri until we left the home on July 9, 1987 where we stayed at the local Howard Johnson's until we moved to Arkansas on August 1, 1987.

9. On September 30, 1987, a hearing was held in St. Charles County Circuit Court after one day of testimony, a Decree of Dissolution was entered by Judge Edward A. Dalton, St. Charles County Courthouse, 3rd & Jefferson, St. Charles, Mo., 63301 on the 4th day of November, 1987.

10. During the above referenced hearing I participated as a party and a witness.

11. It is my firm belief that my daughter should remain in my permanent custody because I have always been the primary caretaker of my daughter. Due to the difficulties that my daughter presently has in her relationship with her father, she is very fearful of him. I do not object to his exercising visitation with CADRA; however, I respectfully request that the Court restrict such visitation until my daughter's relationship with her father, Respondent, GEORGE WARREN GREGORY, has healed.

12. I acknowledge and agree to answer any further questions this Court may have pursuant to Ark. Code Ann. §9-13-209(3)(b).

13. I understand I have a continuing duty to inform the Court of any custody proceedings concerning CADRA in this or in the State of Missouri.

FURTHER, Affiant saith not.

OLA JO P. GREGORY
Dated February 22, 1988

In the Circuit Court
Of St. Charles County, Missouri
Circuit Judge Division

Cause No. CV 187-1762 DR

In Re: The Marriage of

Ola Jo Gregory,
SSN: 431-04-3962
Petitioner,

and

George Warren Gregory,
SSN: 494-50-1787
Respondent

Filed: February 23, 1988

RESPONSE TO MOTION
TO AMEND DECREE/MODIFY

Comes now the Petitioner, through her attorney, Ann P. Faitz, and for her Response to Motion to Amend Decree/Modify states:

1. The Petitioner responds solely for the purpose of challenging the jurisdiction of the court in this cause.

2. With respect to the allegations contained in the Respondent's Motion to Amend Decree, the Petitioner admits she is presently residing at 102 Wildwood Ave., Hot Springs, AR 71913. The Petitioner denies the remaining allegations contained in paragraph 1 and demands strict proof thereof.

3. The Petitioner admits the allegations contained in paragraph 2 of the Motion to Amend Decree.

4. The Petitioner denies the allegations contained in paragraphs 3 and 4 of the Motion to Amend Decree and demands strict proof thereof.

5. The Petitioner affirmatively states that this court lacks *in personam* jurisdiction to retain jurisdiction over the custody of the parties' minor child for one year or to retain jurisdiction to modify, on its own motion and without notice, the physical custody of the child since no such retention of jurisdiction is provided for by §§452.375-452.410, R.S.Mo 1986 and Rule 75.01.

6. The service of process upon the Petitioner concerning a hearing on the Respondent's Motion to Amend Decree/Modify is insufficient and improper in that on January 29, 1988, the Petitioner's prior counsel, Charles W. Niedner, had agreed to withdraw himself as Petitioner's counsel of record in this cause pursuant to a letter sent from him to Petitioner dated February 1, 1988, a copy of which letter is attached and incorporated

herein as Exhibit A. On February 1, 1988, Mr. Niedner filed with the court a Motion to Withdraw, which Motion was granted on February 19, 1988. On February 1, 1988, Mr. Niedner represented the Petitioner at a hearing whereby the Respondent's Motion to Amend Decree is to be considered a Motion to Modify and ordered set for a hearing where Petitioner is to produce the parties' minor child in court for such hearing. By letter dated February 10, 1988, a copy of which is attached and incorporated herein as Exhibit B, Mr. Niedner informed the Petitioner of the hearing and hearing date. Mr. Niedner did not have the authority to act as the Petitioner's attorney in any hearing or in any manner after agreeing to withdraw as attorney of record on January 29, 1988, and actually moving for withdrawal on February 1, 1988. Since Mr. Niedner no longer was effectively representing the Petitioner after January 29, 1988, any hearing notice in this cause should have been properly served on the Petitioner pursuant to Rule 43.01.

7. Additionally, another action is pending between the parties on an appeal from this court's Decree of Dissolution dated November 4, 1987, which appeal is styled In the Missouri Court of Appeals Eastern District, Ola Jo Gregory, Appellant v. George Warren Gregory, Appellee, Appeal No. 54090. Any hearing in this cause on the Respondent's Motion or in any way based on the court's Decree or pending from such Decree should be stayed pending the outcome of the appeal. Rule 55.27(a).

WHEREFORE, the Petitioner, Ola Jo Gregory, respectfully requests that the Respondent's Motion to Amend Decree/Modify be denied or, in the alternative, that any hearing on said Motion or one based on the court's final Decree of Dissolution in this cause or pending from such Decree be stayed pending the outcome of the parties' appeal of such Decree to the Missouri Court of Appeals; for her costs, attorneys fees and all other relief to which the court may deem her entitled.

ANN P. FAITZ
Attorney for Petitioner

In the Circuit Court
Of St. Charles County, Missouri
Circuit Judge Division

Cause No. CV 187-1762 DR

In Re: The Marriage of

Ola Jo Gregory,
SSN: 431-04-3962
Petitioner,

and

George Warren Gregory,
SSN: 494-50-1787
Respondent

Filed: March 8, 1988.

AMENDED RESPONSE TO MOTION
TO AMEND DECREE/MODIFY

Comes now the Petitioner, through her attorney, Ann P. Faitz, and for her Amended Response to Motion to Amend Decree/Modify states:

1. The Petitioner responds solely for the purpose of challenging the jurisdiction of the court in this cause.

2. The Petitioner restates each and every allegation contained in her Response to Motion to Amend Decree/Modify and incorporate them herein as if set out word for word.

3. The Petitioner affirmatively states that this court lacks jurisdiction to make a child custody determination by modification decree pursuant to the Missouri Uniform Child Custody Jurisdiction Act (§§452.440-452.550) in that:

(1) Missouri is not the home state of the parties' minor child and has not been for six months prior to the filing of the Respondent's Motion to Amend Decree [§452.450.1(1)(a)(b)];

(2) The parties' minor child does not have a significant connection with this state [§§452.450.2(a)];

(3) The Petitioner has not been properly served with the petition for modification or with notice of the hearing scheduled in this cause (§§452.455-460); and

(4) A simultaneous proceeding for custody is currently pending in the State of Arkansas in that Arkansas is the home state of the parties' minor child and the most convenient forum for a custody determination (§§452.465-470). The proceeding is style In the Chancery Court of Garland County, Arkansas, Ola Jo Gregory, Petitioner vs. George Warren Gregory,

Respondent, No. 88-, filed on or about February 23, 1988, a copy of which petition and affidavit is attached and incorporated herein as Exhibit A. Any custody hearing in this cause should be stayed pending the outcome of the decision in the Arkansas court (§452.470.4).

WHEREFORE, the Petitioner, Ola Jo Gregory, respectfully requests that this court not assume jurisdiction of this cause; that the Respondent's Motion to Amend Decree/Modify be denied or, in the alternative, that any hearing concerning custody be stayed pending the outcome of the Arkansas custody proceeding; for her costs, attorneys fees and all other relief to which the court may deem her entitled.

ANN P. FAITZ
Attorney for Petitioner

In the Circuit Court of Missouri
Eleventh Judicial Circuit—Division 4

Cause No. CV 187-1762 DR

Ola Jo Gregory, Petitioner
v.
George Warren Gregory, Respondent

TRANSCRIPT OF HEARING HELD MARCH 10, 1988
(pp. 4-5, 7-8)

DALTON, Circuit Court Judge

THE COURT: Okay. Let the record reflect that the Plaintiff, in regard to the motions that were set for hearing, has filed responsive pleadings, and with those responsive pleadings, acknowledge the Court hearing for this morning at 9 a.m.; that she is in default of these proceedings. . . .

The Court will take judicial notice of its court file and will specifically receive into evidence the Decree of Dissolution entered by this Court. . . .

Q. And, so for six months prior to the filing of this proceeding, she had either been in Arkansas or in Missouri?

GEORGE WARREN GREGORY: Yes.

Q. All right. And other than this divorce petition and certain actions that are reflected in the court file that they have now filed in Arkansas, you know of no other proceeding concerning the custody of this child; is that correct?

A. Yes.

Q. And that proceeding in Arkansas was filed after this proceeding, or Motion to Amend or Modify was filed; is that correct?

A. Yes.

Q. Now, other than yourself and your wife, do you know of any person who claims to have physical custody or custody rights of the child?

A. No.

Q. And other than these proceedings, you or your wife—and the one in Arkansas that she's filed after this, you haven't participated in any capacity in any proceeding concerning the custody of the child?

A. No.